IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6009 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GUJARAT STATE CONSTRUCTION CORPORATION LTD.

Versus

INDRAVADAN AMBALAL SONI

Appearance:

1. Special Civil Application No. 6009 of 2003

MR HJ NANAVATI for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 05/05/2003

ORAL JUDGEMENT

1. Heard learned advocate Mr.H.J.Nanavati on behalf of the petitioner - Corporation.

By way of this petition, the petitioner Corporation has challenged the award passed by the Labour Court, Ahmedabad in Reference No.1590 / 1990 dated 18th July, 2002 wherein the labour court has granted reinstatement with continuity of service and full backwages with effect from 27th February, 1997.

2. Learned advocate Mr.H.J.Nanavati for the petitioner Corporation has submitted that the Corporation has already been closed down in the year 1997. Learned advocate Mr.Nanavati referred the deposition at page-27 and pointed out that the workman concerned came to be appointed by the Deputy Engineer and not by the Corporation and thus, the workman was not employed by the corporation, however, his salary was also being paid by the Corporation on Vouchers. Learned advocate Mr.Nanavati also submitted that the Corporation is had recruitment procedure and the same required to be followed in each case of recruitment and the workman was not recruited by the Corporation by following due procedure. It is also contended that the workman was appointed merely for a temporary work of construction which was going on the site. He also submitted that normally Engineers are appointing such local persons where construction work was going on undertaken by the Corporation. Thereafter, his services came to be terminated or he was discontinued on service after completion of such construction work. He also raised important question that when the Corporation is closed down, the question of reinstatement does not arise. He also referred to discussion made by the labour court which is at page.17 of the petition where the workman admitted in his evidence that he was appointed by the petitioner Corporation and the workman could not produce appointment letter. It may be noted that this aspect is dealt with by the labour court concluding that afterall the workman is workman and when the petitioner institution failed to produce such appointment letter, how the court concerned could know the terms of the appointment and in absence of such appointment letter, the labour court has presumed that the workman concerned was not appointed for specific period.

3. I have considered submissions made by the learned advocate Mr.H.J.Nanavati on behalf of the petitioner. I have also perused the award impugned in this petition. It was undisputed between the parties that on the basis of the certificate issued by the Corporation which is at Exh.8/1 wherefrom it transpired that the workman concerned had worked on the post of Peon-cum-Watchman for a period from 4-3-1983 to 15-10-87. It is pertinent to

note that this certificate was admitted by the petitioner herein and the same was not disputed by the petitioner before the labour court, meaning thereby, the workman remained in service continuously for a period of more than four years and in each year, he had completed continues service of 240 days with the petitioner and the salary was paid by the Corporation though the workman was local person appointed by the Deputy Engineer. However, a moment the Deputy Engineer having powers to appoint such local person after paying salary to such local person, such appointment given by the Deputy Engineer of the petitioner Corporation must have to be recognised by the corporation, otherwise, there is no need for the Corporation to have appointments made by their own Engineers concerned competent for the purpose. Therefore, the contention raised by the learned advocate Mr.Nanavati that the workman concerned was not the employee and not appointed by the petitioner Corporation cannot be accepted but as such, the contention seems to be contrary to be record. I have also perused the oral evidence which was produced by the petitioner. Before the labour court, statement of claim was filed by the respondent workman and reply was submitted by the petitioner vide Exh.7. The contention was raised in the written statement that it was an appointment on contract basis and after completion of the project, his service was terminated by the Corporation. Thereafter, vide Exh.8 the workman had produced certificate issued by the petitioner Corporation and at Exh.9 the workman concerned was examined and cross examined by the petitioner. Thereafter, one Shri Girishbhai Shah was examined vide Exh.16 who was cross examined by the workman. Thereafter, certain documents were produced and the Circular was also produced and vouchers were also produced by the petitioner. Ultimately, the labour court has considered submissions made by both the learned advocates for the parties and come to the conclusion that the petitioner has not produced any written or oral evidence before the labour court that the workman was working as Part-timer. It was undisputed between the parties that the workman was working as Watchman and he had completed more than four and half years service with the Corporation. The petitioner corporation has not produced any appointment letter / order in respect of the workman for proving the fact that it was project employment or it was contractual employment of the workman. In absence of the appointment order, it cannot be inferred only on the basis of the oral evidence that workman was appointed only on project basis or on contractual basis. Therefore, the labour court has rightly come to the conclusion that it was not

appointment based on contractual or project basis. However, decision was relied upon by the petitioner the labour court has rightly distinguished in the discussion made at page-13 internal page.6. The labour court has also rightly appreciated that even though the workman was aware of the fact that he was appointed only for the work of construction and therefore, it was the duty of the corporation to prove that he was appointed on contractual basis or for a particular project. In absence of such documents, Section 2[oo][bb] not made applicable and it can be considered to be continues employment and therefore the labour court has, after appreciation of oral and documentary evidence on record, come to the conclusion that the workman was not appointed on any contractual or project basis. Even the decision which has been relied upon by the petitioner, has been rightly distinguished by the labour court in paras-13 to 16. It may be appreciated that the labour court has considered the facts and circumstances of the case and also considered the decision relied upon by the petitioner and given the cogent reasons while not relying the decision cited by the petitioner Corporation, meaning thereby, the labour court has applied the mind and distinguished the judgment which has been relied upon by the petitioner Corporation. Therefore, it is considered that the labour court has rightly appreciated that if the workman has committed any mistake in deposition before the labour court that he was having appointment order issued by the Corporation but in absence of such appointment order and even the petitioner corporation has relied upon the evidence of the workman and therefore, the labour court has, ultimately, come to the conclusion that afterall the workman is workman, he might commit such mistake while giving deposition but it was the burden upon the employer to prove this fact that the workman was appointed on contractual basis or project basis. Therefore, the labour court has rightly appreciated the evidence and come to the conclusion that the workman was not appointed on contractual basis, in other words, not appointed for specific period, nor on project employment. Thereafter, the labour court has considered that the Reference was preferred in the year 1990 and the workman given his deposition in the year 1997 and therefore, the labour court has not granted any amount of backwages upto 1997 and only granted backwages from the date of oral evidence of the workman i.e. 25th February, 1997. Therefore, considering discussions and reasoning given by the labour court, according to my opinion, the labour court has rightly dealt with the matter and rightly appreciated the documentary and oral evidence produced on record before the labour court.

4. So far the contention raised by the learned advocate Mr.Nanavati that the workman was appointed on contractual basis as well as project employee and therefore, provisions of Section 2[oo][bb] will apply in the case of the workman. However, fact remains that the workman had completed continues service of more than four and half years which is not disputed by the petitioner and in absence of appointment order, it was very difficult to believe the say of the petitioner Corporation. Moreover, in case of project employment, it was the duty of the employer to specifically intimate to the workman that this is project employment for specific period. In absence of such documentary evidence, the contention raised by the learned advocate Mr.Nanavati does not bear any substance and the same cannot be accepted. Similarly, this was not rightly believed by the labour court concerned while dealing with the reference. Recently, this aspect has been considered in detail by the Apex Court in case of S.M.NILAJKAR V. TELECOM, DISTRICT MANAGER, KARNATAKA reported in 2003 [3] SCALE 533 and held that unless and until the workman is made clear that such appointment is for particular project or particular period, except that, it cannot be considered that it was an appointment for project or contractual basis. The relevant observatins made by the Apex Court in aforesaid decision in para-13 & 14 are reproduced as under :-

"13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause [bb] subject to the following conditions being satisfied :-

[i] that the workman was employed in a project or scheme of temporary duration;

[ii] the employment was on a contract, and not as a daily wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and

[iii] the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract.

[iv] the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being envisaged in a scheme or project which was to last only for a particular length of time or upto to the occurrence of some event, and therefore, the workman ought to know that his employment was short lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complain that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of sub-clause [bb] abovesaid. In the case at hand, the respondent employer has failed in alleging and proving the ingredients of sub-clause [bb], as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily wagers in a project. For want of proof attracting applicability of sub-clause [bb], it has to be held that the termination of the services of the appellants amounted to retrenchment."

5. In respect to contention raised by learned advocate Mr.H.J.Nanavati that Corporation is closed and therefore, no reinstatement order can be passed by the labour Court against closed Corporation. This submission made by learned advocate Mr.Nanavati cannot be accepted on the ground that once employer breached condition precedent of Section 25-F of the I.D.Act, 1947 being mandatory provision, then termination order becomes ab initio void, means legally not existed. Then workman entitled normal relief of reinstatement with backwages. In such circumstances, even direction from the Labour Court is not necessary but workman is deemed to be in service for all purposes. Mere declaration is enough. Such view is taken by the Apex Court in case of MOHANLAL V. MANAGEMENT OF BHARAT ELECTRONICS LTD reported in AIR 1981 SC 1253. The said decision of the Apex Court is

also considered by the Division Bench of our High Court in case of N.P.RAMANANDI reported in 1985 [2] GLR 1040. In the said decision, the High Court has set aside the award of the Labour Court wherein only granted compensation in lieu of relief of reinstatement. However, the view taken by the Division Bench of the High Court that once termination is held to be bad for violation of Section 25-F of the I.D.Act, then the Labour Court should grant normal relief of reinstatement with backwages. The labour court has no jurisdiction to deny relief of reinstatement to workman once Section 25-F of the Act is proved to be violated by the employer. Therefore, looking to the facts of the present case, the workman was remained in service continuously for more than four years with the Corporation and undisputedly, Section 25-F of the I.D.Act has not been followed at the time of termination, then, the labour court concerned is having jurisdiction to grant normal relief of reinstatement and for that, the labour court has not committed any jurisdictional error.

6. Similarly, even in case when the post in question is abolished after termination of workman and having financial difficulties, are also no grounds to deny relief of reinstatement to the workman when termination is found bad as a result of violation of Section 25-F of the I.D.Act. That view taken by the Division Bench of the High Court in case of DAMNAGAR PANCHAYAT reported in 1994 [1] GLR 579. In case if the post is abolished, then the employer shall have to create supernumerary post for implementation of direction of reinstatement. This being settled position of law, rightly considered by the labour court and granted relief to the respondent workman. It may also be appreciated that the petitioner has not proved any periodical appointment or project employment. Therefore, Section 2[oo][bb] is not applicable. However, even considering the legal position of Section 2[oo][bb] of the I.D.Act, 1947, which came in force with effect from 18th August, 1984. In present case, workman initially appointed on 4-3-1983. Prior to amendment of Section 2[oo][bb] of the Act, means, this amended Section was not in statute book when workman initially appointed. Not only this, the said amended Section is not having any retrospective effect as held by the Division Bench of High Court in case of Bharat Heavy Electronics Ltd reported in 1989 [2] GLH 1. Therefore, even in considering some part of oral evidence of workman that he was appointed on construction work also not makes any differences unless specific appointment order or contract in writing given tot he workman as per the above referred decision in 2003 [3] SCALE 533. In view of above legal

position and in light of oral and documentary evidence on record of the present case, the submissions made by learned advocate Mr.Nanavati cannot be accepted. In short, when the petitioner has failed to establish their case before the labour court concerned by producing satisfactory evidence, the burden upon Corporation is not discharged properly by Corporation. The respondent workman was appointed by the Corporation through Deputy Engineer and wages paid by the Corporation regularly to the workman. The workman completed continuous service of more than four years without any break of any single day. Therefore, the labour court has rightly adjudicated the Reference on the basis of the evidence on record and for that, the labour court has not committed any error and therefore, no interference of this Court is warranted in any way.

7. Therefore, considering the observations of the Apex Court in recent decision on this point, according to my opinion, the labour court has rightly decided the matter and as such, there is no error committed by the labour court concerned while passing such award. There is no procedural irregularity committed by the labour court while passing such award and even in case where two views are possible, then also, this Court having very limited jurisdiction to interfere with the award passed by the labour court while exercising the jurisdiction under Article 226 and 227 of the Constitution of India.

8. Recently, this aspect considered by the Apex Court in reported decision in case of ESSEN DEINKI V. RAJIV KUMAR, 2003 SC Labour & Service page 13. Relevant paragraphs are as under:

> 2. Generally speaking, exercise of jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the article is not called for.

3. The observations above, however, find affirmance in the decision of this Court in Nibaran Chandra Bag V. Mahendra Nath Ghughu. In Nibaran this Court has been rather categorical in recording that the jurisdiction so conferred is by no means appellate in nature for correcting errors in the decision of the subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority. More recently, in Mani Nariman Daruwala Vs. Phiroz N.Bhatena this Court in a similar vein stated: (SCC pp. 149-50, para 18)

"In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above the High Court has no jurisdiction to interfere with the findings of fact."

4. Needless to record that there is total unanimity of judicial precedents on the score that error must be that of law and patently on record committed by the interior tribunal so as to warrant intervention - it ought not to act as a court of appeal and there is no dissension or even a contra-note being sounded at any point of time till date. Incidentally, the illegality, if there be any, in an order of an inferior tribunal, it would however be a plain exercise of jurisdiction under the article to correct the same as otherwise the law courts would fail to subserve the needs of the society since illegality cannot even be countenanced under any circumstances.

5. In this context reference may also be made to a still later decision of this Court in the case of Savita Chemicals (P) Ltd. Vs. Dyes & chemical Workers' Union wherein this Court in para 19 of the Report observed: (SCC p. 166)

"Under Article 227 of the Constitution of India, the High Court could not have set aside

any finding reached by the lower authorities where two views were possible and unless those findings were found to be patently bad and suffering from clear errors of law."

9. In view of above discussion, according to my opinion, there is no slightest error committed by the labour court concerned while passing the award in question and therefore, no interference of this Court is called for while exercising the powers under Article 226 and 227 of the Constitution and hence, there is no substance in this petition and the same does not deserve to be entertained.

10. Considering the observations of this Court in forgoing paragraphs, there is no substance in the present petition and the same is rejected at the threshold.

No order as to costs.

11. However, at this stage, learned advocate Mr.Nanavati submits that since the Corporation is closed down and therefore, it is very difficult for the Corporation to reinstate the workman at this stage. However, it is observed that it is ultimately burden upon the Corporation, how to deal with the matter. Needless to say, the petitioner Corporation being the State Authority having efficient legal experts to seek advice to enable the State Authority to deal with the matter in such situation.

Date : 5-5-2003 [H.K.Rathod, J.]

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